

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK
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3 ANTHONY ANDRE PAUL, et al.,
4
5 Plaintiffs,

6 v.

16 Civ. 1952 (VSB) (SN)

7 CITY OF NEW YORK, et al.,
8
9 Defendants.

Conference

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New York, N.Y.
March 13, 2019
3:40 p.m.

10 Before:

11 HON. SARAH NETBURN,

12 Magistrate Judge

13
14 APPEARANCES

15 THE COCHRAN FIRM
16 Attorneys for Plaintiff
17 BY: DEREK S. SELLS
STEPHANIE R. CORREA

18 ZACHARY W. CARTER, Corporation Counsel
19 For the City of New York
20 Attorneys for Defendants
BY: SUSAN P. SCHARFSTEIN

21 FURMAN KORNFELD & BRENNAN LLP
22 Attorneys for Defendant New York City Health and
23 Hospitals
24 BY: PATRICK J. BRENNAN
25 KAITLIN DRUMMOND

1 (Case called)

2 MR. SELLS: Good afternoon, your Honor. Derek Sells,
3 on behalf of Mr. Paul.

4 THE COURT: Thank you.

5 MS. CORREA: Good afternoon, your Honor. Stephanie
6 Correa, on behalf of Mr. Paul.

7 THE COURT: Thank you.

8 MS. SCHARFSTEIN: Good afternoon, your Honor. Susan
9 Scharfstein. I represent the city and the ten individual
10 defendants.

11 THE COURT: Thank you.

12 MR. BRENNAN: Patrick Brennan for New York City Health
13 and Hospitals Corporation. Good afternoon.

14 MS. DRUMMOND: Good afternoon. Kaitlin Drummond, also
15 for the New York City Health and Hospitals Corporation.

16 THE COURT: Thank you.

17 Thank you all for coming in. I have a series of
18 letters to be addressed today. I have letters from the Cochran
19 firm dated February 26, February 28, and March 8. And I have
20 letters from Corporation Counsel dated March 5 and March 12. I
21 understand that there are a number of disputes largely focused
22 on the depositions going forward in this case.

23 So let's jump right in. As I understand it, the
24 plaintiff is seeking four additional depositions from the 20
25 I've already authorized and it sounds like about a half a dozen

1 have been taken thus far.

2 Is that accurate, Mr. Sells?

3 MR. SELLS: I don't think it's a half dozen, your
4 Honor, but we've taken a substantial number. I don't know what
5 the exact number is. I think if I go down the list, we've
6 taken Hefner, we've taken Smiddy. Eight so far, your Honor.

7 THE COURT: Half of a baker's dozen.

8 MR. SELLS: We have a number of other ones coming up.

9 THE COURT: OK.

10 So I authorized 20 depositions in September, I
11 believe, and I want to talk now about why you believe having
12 taken eight depositions that you can already contemplate that
13 you're going to need an additional four. Some of the
14 depositions that you've listed have the potential at least to
15 be repetitive, some of them it's not entirely obvious to me why
16 you need them. For instance, there are a number of people from
17 the hospital that you're seeking to depose regarding
18 observations of the decedent. I'm not sure exactly what kind
19 of disputed evidence you need at that stage in the incident
20 that would justify taking, I think it's four depositions of
21 people at the hospital. It seems to me that there are two EMTs
22 that you're seeking to depose from TransCare. Again, it's not
23 obvious to me why you would need to take those depositions and
24 certainly not two of them, especially when you haven't taken
25 any yet and don't know whether or not you'll get clarity on

1 some of the issues.

2 So, do you have a basis for seeking to exceed the 20
3 depositions at this point?

4 MR. SELLS: Yes, your Honor.

5 The reason that we need more depositions is because of
6 the investigation that was done in this case by FID.

7 THE COURT: By FID, sorry.

8 MR. SELLS: Yeah, so the Force Investigation Division.

9 Your Honor, I have a confidential document that has
10 been previously marked in depositions as Plaintiff's Exhibit 3
11 that I'd like to hand up to you. The reason that we didn't
12 include it is because it's in part in response to the city's
13 last letter. So what I want to be able to show your Honor is
14 why we need these depositions. We believe that the Force
15 Investigation Division was responsible for covering up what
16 happened at the scene and also what happened at the hospital in
17 order to avoid liability on the part of the police officers
18 either criminal or civil.

19 And if I can explain, I think their report will show
20 this.

21 THE COURT: Have you shown it to the defendants what
22 it is you're --

23 MR. SELLS: I have copies that I can share with them,
24 although their copies won't be in color.

25 THE COURT: That's OK.

1 MS. SCHARFSTEIN: Thank you.

2 THE COURT: You don't have an extra copy set, do you,
3 for my law clerk?

4 MR. SELLS: I don't. I'm sorry.

5 THE COURT: That's OK.

6 MR. SELLS: But if you go through their
7 investigation, it pretty much tries to describe what occurred
8 with my client in this incident. So you see like you start off
9 and they say, oh, this happened July 1, and there was a call
10 regarding a barricaded EDP, he was on K2. They believe he was
11 smoking K2. And then ESU comes and if you flip through to, I
12 guess it's the front lobby area of 28 -- if I can just approach
13 a little bit.

14 THE COURT: Yes.

15 MR. SELLS: The front lobby area of 2846 Briggs
16 Avenue. This is where my client's room was. So ESU, they go
17 there and they hear my client banging, banging, banging on the
18 door for hours straight, just yelling, cursing and being
19 incoherent at times. They call a hostage negotiator there, and
20 at some point they try and get some surveillance of them to see
21 what's going on. They put multiple cameras into the room.
22 They're able to observe him naked, they claim, and at some
23 point they decided that they need to make a partial door breach
24 so they can put another camera in.

25 And they put a saw, they saw through the door, and

1 they say they cut my client with the saw. At which point they
2 stopped the saw. Then they say all this blood comes pouring
3 out from the door, so they believe my client was in an emergent
4 situation so that made them have to enter. So they decided
5 that they were going to bust through the door. And then two
6 Tasers, they claim, were deployed simultaneously against my
7 client.

8 If you look at the reports that the two officers who
9 used the Tasers that need, they filled out reports of their
10 Taser use, and both of them say that their Tasers worked, that
11 the prongs, because the way the Tasers work is when you fire
12 them from a distance, they have two prongs that go into the
13 person that they hit. And when these two prongs go in, once
14 they go in, they form a circuit so that an electrical charge
15 then goes between the two prongs. It's meant to shut down the
16 central nervous system. So both of these otherwise on the
17 night that this happened say that they fired these prongs and
18 they get my client on to the ground.

19 They say that my client is covered in blood, that his
20 head, his face, every part of him is covered in blood. And
21 that it's so bloody on the floor that they're slipping and it's
22 hard to get a handle on them. So this is the narrative that
23 we've been given by the officers that we've deposed so far in
24 some of the records, including the records that come from FID
25 and their investigation.

1 They then, if you go further into the document, you'll
2 see that they show the equipment that was used, the saw with
3 the blade. If you go through, you'll see like the saw where
4 they cut through the door and there's blood or what looks like
5 blood there, you see the cuts on my client's hands, right, to
6 make it seem as though, OK, he was cut. But when you look at
7 the medical records, including the autopsy report, you'll see
8 that there wasn't really a blood vessel that was hit. And
9 there wasn't that much blood that he lost.

10 And if you look at the autopsy photos that appear in
11 this document, you'll even see that my client is not covered in
12 blood at all, but when the crime scene search team gets to the
13 location, there's a bucket, there's a picture of a bucket that
14 looks like it's almost a quarter -- it's like a sizable bucket,
15 it looks like there's almost a quarter or more of a red
16 substance in it. There's a mop that's pictured that looks like
17 it could have been used because there's red stuff on it. There
18 is another bucket that has water in it with a rag in it and
19 there looks to be blood stains around that.

20 And there was a witness who was asleep in a back
21 bedroom during all of this. And when ESU does a search, a
22 secondary search and they pull this witness out, he sees the
23 ESU people cleaning up what appears to him as cleaning up in
24 the room. In fact, he says, Can I help you, in his own written
25 statement and he's ushered out.

1 ESU people testify that they're covered in blood, that
2 their equipment, everything is covered in blood as a result of
3 interacting with my client. They say that after they do this,
4 they go back and they meet, they all meet at -- in the places
5 where the ESU comes out of is called truck 2, they all meet.
6 And they find out that my client dies. And once they find out
7 that he dies, they start getting rid of their uniforms, the
8 ones that were covered in blood, they claim, they start getting
9 rid of them. Some of them say they throw them away, some of
10 them say they washed it. But we have real question as to
11 whether this is my client's blood because it doesn't match up
12 with the medical records. He didn't lose that much blood.

13 So we want to know what happened to that bucket that
14 appears to have this red substance in it? What happened to the
15 mop that appeared to have red substance on it? What happened
16 to the pail that's depicted in the shower, in the bathroom of
17 my client's room that has a red tinge around it? What happened
18 to all the blood that was on the floor, on the door, was it
19 ever tested? Whose blood is it? And we don't know because
20 it's not in the records. There's nothing that says that this
21 blood was ever tested. There's nothing that says that this
22 bucket was ever kept.

23 THE COURT: None of that answers my question about why
24 you think today you need to depose four people at the hospital
25 or two people who were the TransCare EMTs.

1 MR. SELLS: So the reason that we have these names is
2 because these people were either interviewed by this Force
3 Investigation Division or they were requested to have
4 interviews with the Force Investigation Division. One person
5 testified -- or not testified, but told force investigation
6 that when my client was brought into the hospital, he appeared
7 to be unconscious and not moving. He was then reinterviewed
8 three weeks later by the Force Investigation Division and he
9 told a completely different story saying that my client was
10 combative and resistant to attempts to get assistance, medical
11 assistance.

12 Another of the witnesses, and this is Ms. Robinson,
13 refused to testify without having her representative present.
14 Another witness also testified that, yeah, when he came in,
15 didn't look like he was moving. But if you look at what nurse
16 Matera says, she says that my client was combative during the
17 time that he was in the emergency room. Dr. Silverberg says
18 that he tried to bite people in the emergency room. Even
19 though no one else says it, Dr. Silverberg says that he tried
20 to bite someone.

21 The two police officers who accompanied Mr. Paul to
22 the hospital, right, because they with respect to ESU, but they
23 came with him in the ambulance ride, they describe when --
24 well, one of them describes Mr. Paul as not speaking, that the
25 only combative gesture he made was he raised his arm, and that

1 when he got to the hospital he was still in cuffs and he was
2 strapped down not really resisting at the hospital.

3 So there's a dispute among and between these witnesses
4 as to what happened, but we do know that FID, when they
5 interviewed, I think it was Goulart, when they interviewed
6 Goulart, they first interviewed him, I believe it's on the day
7 that the incident occurred, but then they go and speak with
8 him, I think it's a couple of weeks later, he gives a
9 completely different story. So we want to be able to get from
10 these witnesses their version of events under oath because
11 they're so conflicting. And that goes to, again, the standard
12 of care that should have been given to him based upon what
13 these folks are saying.

14 THE COURT: Can I ask you a related question?

15 MR. SELLS: Sure.

16 THE COURT: My read of your complaint is that your
17 only *Monell* claim relates to the city's practices and policies
18 related to EDPs, and that you don't have a *Monell* claim related
19 to the use of the Taser, that you have an excessive force claim
20 related to the Taser use but not a *Monell* claim.

21 Is that correct?

22 MR. SELLS: Well, our *Monell* claim is based upon the
23 use of excessive force against isolated and contained EDPs.
24 And the excessive use of force can relate to Tasers as well as
25 other weapons, but in this particular case, we have certainly

1 violations of the Taser policy that existed in 2015 with
2 respect to what happened with Mr. Paul.

3 THE COURT: But why do you need to have a history and
4 training and the types of *Monell* discovery one normally seeks
5 in connection with Tasers. It seems to me you're entitled to
6 know what the policy was related to Tasers at the time of
7 Mr. Paul's death and whether or not what was the training
8 material that the defendant -- defendant officers received to
9 see whether or not they acted in compliance with that which
10 would, I think be relevant to whether or not they were acting
11 with excessive force.

12 MR. SELLS: If I could take you to this page.

13 THE COURT: I'm sorry. If I could finish my sentence.

14 MR. SELLS: Oh, I'm sorry.

15 THE COURT: But it doesn't seem to me that the long
16 list of notice topics related to Tasers is really relevant here
17 and, particularly, going back years and years before your
18 client's death.

19 MR. SELLS: If you could go to this page, the ESU
20 Taser page that has the red asterisk next to DiFranchesla's
21 name. So as I had mentioned before, the early morning that my
22 client was Tasered by DiFranchesla and McNamara, both of those
23 officers wrote reports saying that the Taser prongs went in and
24 that the Tasers worked. These reports were signed off on by
25 two other supervising ESU officers who also went into

1 Mr. Paul's apartment that night.

2 Now, Mr. Paul was naked. All of these officers that
3 have testified so far said that they were able to observe
4 Mr. Paul after he was Tasered laying on the ground. So they
5 could see the Taser prongs. There's a picture in the very next
6 page of this exhibit shows where the three Taser prongs that
7 were found on Mr. Paul's body. Only three were found on his
8 body. So what the FID did was they suggested -- even though
9 the officers both wrote reports saying that the Taser prongs
10 were in and that the Tasers worked, one of the Taser prongs was
11 no longer in Mr. Paul's body by the time he got either to the
12 hospital or to the morgue. And so what FID did was they
13 claimed that one of the Tasers did not work because the two
14 Taser prongs weren't in his body.

15 So what we want is to know where the Taser prongs are,
16 because there were four Taser prongs. We've only seen three,
17 where's the fourth one. If you look at the crime scene search,
18 there's no prong. They didn't find any prong. There's no
19 prong in the ambulance, there's no prong at the hospital. What
20 happened to the fourth prong?

21 So the other thing, your Honor, is with these Taser
22 prongs, there are wires that attach to a cartridge. So when
23 the Tasers fire, not only do the Taser prongs go in, but the
24 wires go in. Those wires are not supposed to be removed from
25 the prongs because if the wires are removed in the process of

1 removing the prongs, a prong could come out. Now, what we know
2 is based upon the autopsy report. Dr. Smiddy found a puncture
3 wound to Mr. Paul's neck where there was no Taser prong, OK?
4 This puncture wound was not caused at the hospital, because
5 there was no intervention in the medical records that showed
6 any type of needle going into Mr. Paul's neck. So we believe
7 that that was a Taser prong.

8 Now, we need to have the protocols on how the Tasers,
9 the Taser prongs, the cartridges and the wires, what was the
10 protocol on how they were supposed to be collected? What was
11 the protocol on how they were supposed to be tested, and we
12 need to know all the things that we're asking for so that we
13 can determine whether or not procedures were violated in the
14 way that this investigation was conducted because we have no
15 information, we have absolutely no information about the wires,
16 the Taser prongs, the cartridges, and we have not seen the
17 Tasers.

18 The next thing that you see is that they have a time.
19 If you go back to this page, they list the times that the
20 Tasers were allegedly fired. OK? But what it doesn't tell you
21 is that those times were manipulated. And I'm going to show
22 you another document.

23 THE COURT: Can I stop you for one second. We're not
24 trying the case right now. We're having a conversation whether
25 you should take 24 depositions or 20 depositions, and I want to

1 bring you back to the issue in dispute. I'm not here to learn
2 your entire case. And so if you've got a document that's going
3 to explain to me why I should rule now that you're entitled to
4 24 depositions, I'm happy to hear from you, but I feel like
5 we're getting a little bit far afield.

6 MR. SELLS: I thought you asked about the 30(b)(6)
7 topics, because I'm trying to get into why we should be able to
8 talk about all the things that we want to talk about with
9 regard to the 30(b)(6) witnesses.

10 THE COURT: My question for you is first why you
11 should be making decisions now that you need an additional four
12 from what I was already ruled, and I asked questions about the
13 policies behind seeking sort of years in advance of the
14 incident the policy and what you've told me is that you need to
15 know sort of what was going on on July 1, 2015 with respect to
16 the use of Tasers and how they were discharged, whether people
17 were allowed to pull the wires, how they were stored, that sort
18 of information, but you haven't yet answered questions about
19 discipline and training of ESU officers who violate Taser
20 policy, substantiated allegations about Taser policy. I don't
21 know why you're entitled to all of that.

22 MR. SELLS: Again, it goes to the issue of excessive
23 force. If there's no discipline for officers that violate
24 what's prohibited use of a Taser, for example, in this case
25 there was a prohibition of two officers simultaneously using

1 Tasers against one person at a time. There was also a policy
2 that prohibited any more than three Taser cycles being used
3 against an individual at one time. Here there were 13. And so
4 the idea that these policies were broken and that there was a
5 history of these policy policies, the reasons that these
6 policies were given or were in place, and then that there was
7 no discipline issued against an officer who violated these
8 policies, would lend itself to proving our claim, that this was
9 No. 1, an intentional act, No. 2, that it was done as a method
10 of essentially torture, that it was excessive, in that it would
11 subject the city or these individuals to liability personally
12 for punitive damages.

13 And so if we need to have that whole background so we
14 can show that these officers knew about these policies or
15 should have known about these policies and didn't follow them
16 intentionally.

17 THE COURT: All right. Let me give Ms. Scharfstein an
18 opportunity to respond.

19 MR. SELLS: If I could, your Honor, because I think
20 this is a very important part in terms of the Tasers. So if I
21 could just hand you, I'll pass these around, if I can just hand
22 you the Taser record, you'll see that -- and if I could just
23 direct your attention to the second page first.

24 THE COURT: I'm not going to have these marked as
25 court exhibits because I understand that they're confidential.

1 So I'll look at them, but they're not going to be part of the
2 record.

3 Everybody agrees?

4 MS. SCHARFSTEIN: Yes, your Honor.

5 MR. BRENNAN: Yes, your Honor.

6 MR. SELLS: Your Honor, if you go to the second page,
7 you can see that this is not the handwritten portion of it, but
8 the typewritten portion is the actual readout from the Taser.
9 So for this one Taser, you can see starting at 0012, these are
10 the times that the Taser was fired against Mr. Paul according
11 to the Taser itself because the Taser has an internal clock
12 where it tells you the time and the date and the duration of
13 the charge.

14 And if you look, you can see, for example this Taser
15 fired at 29:42 and these cycle goes for five seconds. So the
16 next one is at 29:49. So seven seconds later. And then 29:55,
17 30:01, 30:08, then 30:17. That's what the Taser says. Now,
18 that was for one Taser.

19 If you go to the second Taser, and this one will be --
20 the second to the last page, again, if you ignore the
21 handwritten portion and whatever was written in red, if you
22 just look at the time that the Taser itself printed out, it
23 says that the Taser fired at 34:25, 34:31, 34:37, 34:33, and so
24 on. So if you go by what the Taser says, this Taser was fired
25 five minutes after the first Taser. The ESU officers

1 testified -- when Mr. Paul was on the ground, he was in cuffs
2 within 20 seconds of the first Taser. So now you have five
3 minutes later, he's being Tased another six times or seven
4 times.

5 So somehow when you get back to that FID document, it
6 says that those Tasers were fired simultaneously. It doesn't
7 account for this five-minute delay that the actual Taser
8 readout says. So the question comes, under what circumstances
9 can you push back the time -- the internal time of a Taser to
10 make it appear as if it fired at a different time? And what is
11 the maintenance of it? How do you know that the Taser is not
12 on the same -- it's working on same time that the Taser says
13 it's working on?

14 So this is the kind of thing that we have no
15 explanation for based upon the records that we've seen. All we
16 see is this handwritten stuff that says, oh, you know, the red
17 says when the Tasers were and you see something that says
18 synced on the first page, it says synced, but we need to get
19 behind that and figure out how it happened, who did it.

20 And at this point, we don't know, so we attempted to
21 get this information from the person who put together this
22 PowerPoint, the FID PowerPoint, that was Detective Beelitz.
23 He's the one that put this together. But then when we
24 questioned him, he didn't have any knowledge about the
25 substance of what he put together. He just said Chief Sprague

1 told him to do it, so he did it. So he turned out, as the city
2 correctly states, to be a witness with no helpful information,
3 he just said that, you know, Sprague told him to do it. That's
4 why we have all these FDNY people because we don't know FID
5 people, we don't know based on the records who did what, we
6 don't know who synched, we don't know who wrote this stuff up,
7 we don't know how all the sudden that one Taser operated and
8 the other one didn't.

9 THE COURT: I understand your argument.

10 Let me hear from Ms. Scharfstein.

11 MS. SCHARFSTEIN: Thank you, your Honor.

12 I hope it will suffice to say that I disagree with
13 many of the statements that Mr. Sells has made, I don't
14 necessarily think there's an evidentiary basis for it, but
15 since, as your Honor has pointed out, we're not here to argue
16 the merits of the case, I would just prefer to leave it at that
17 and not address it point by point and just address the question
18 about the discovery issue.

19 THE COURT: Sure.

20 MS. SCHARFSTEIN: So my thinking on that is that there
21 may be some miscommunications or misconceptions here. And what
22 I am hoping to do, what I would like to do very much is to
23 sequences the depositions so Mr. Sells gets the answers to the
24 questions he needs and we can certainly have someone explain
25 this document to him, and to do that in a way that may make

1 other depositions that he now thinks are necessary unnecessary.
2 So that's really my point with regard to the depositions, that
3 it's really premature for him to decide he needs multiple
4 investigators.

5 He wanted Detective Beelitz's deposition. We at the
6 city wanted to cooperate in discovery. I strongly suspected it
7 was not going to be productive. Detective Beelitz had a very
8 limited role. He has a lot of knowledge about how to put
9 together the PowerPoint presentations and that's exactly what
10 he did, he took information that was provided by other people
11 that he had no knowledge of and he put it in the form of a
12 PowerPoint presentation. This was intended to be an executive
13 briefing about maybe 14, 15 days after the incident. It was
14 expressly made based on preliminary information and that's all
15 it was. We don't even have the full presentation here. I
16 gather that Mr. Sells printed out the paper, but there is some
17 additional information behind it because it's more in the
18 nature of a little film than really a two-dimensional
19 presentation. So there are some other pieces to it, but just
20 so you're aware, but I don't think that's really the point
21 here.

22 I guess I would make two suggestions as to how this
23 may be resolved going forward more satisfactorily to all sides.
24 And one is that we sequence the depositions in a way that makes
25 sense and the other is that I would hope that Mr. Sells would

1 make more of an effort to make the time productive and to ask
2 questions of the witnesses rather than trying to box them into
3 some sort of admission that doesn't make any sense, because
4 many of the topics that he's asking about are really beyond the
5 scope of the particular witness's knowledge. I think that if
6 we were somehow able to do that, we would get through the
7 depositions more quickly, Mr. Sells would have more in the way
8 of the answers that he needs, and we would be able to complete
9 this whole process expeditiously.

10 And my concern is that if Mr. Sells starts with the
11 premise that there was some kind of coverup and that
12 depositions and additional discovery is needed to illuminate
13 these apparent inconsistencies and people's motives and why
14 different witnesses may have said different things, there will
15 be no end to it, because there will always be some other piece
16 of information out there or some other deposition to be taken
17 that might somehow lend credibility in his view to the fact
18 that there was some sort of coverup. All of that, if anything,
19 relates to what happened after the incident. It doesn't relate
20 to the basic facts as to what happened at the scene, what the
21 officers saw, what they knew, what they were informed by others
22 and how that affected what steps that they took to resolve the
23 incident. And that's really the centerpiece of this case, and
24 I would hope that the parties and the Court could focus on
25 that.

1 THE COURT: Do you want to speak as to the 30(b)(6)
2 issue?

3 MS. SCHARFSTEIN: On the Tasers, I mean, I think that
4 we've been willing to produce a witness. There are some
5 concepts that may not be available to an attorney who's not
6 Taser trained. It's really the scope of the deposition that
7 we're objecting to and the fact that it really goes beyond any
8 issues in the case. If, for example, he needed a witness to
9 explain this particular document which relates specifically to
10 this case, I think we could do that. Again, it's really the
11 scope of the two depositions, 30(b)(6) depositions that really
12 go far beyond this. Your Honor said the discipline, the
13 allegations, they have nothing to do with what the officers
14 knew at the time. Certainly if the officers were aware of some
15 incident where it was believed that some officer overstepped
16 and wasn't disciplined properly, I mean, if the officer knew
17 about it, that could be a subject of inquiry at that officer's
18 deposition.

19 There's no reason, in my view, to have a
20 representative of the city try to manually review hundreds or
21 thousands of files to try to isolate matters that the Court may
22 decide properly relate to this case when there really isn't a
23 *Monell* claim. My understanding is the *Monell* claim relates --
24 is specifically based on that memoranda from the other case
25 that had to do with partial door breaches, and that's the way

1 it's pled in the complaint.

2 THE COURT: Do you want to speak about your
3 objections, if any, as to the notice topics for the EDP
4 30(b)(6)? I know there's an objection about timing. But other
5 than that, do you want to speak to any issues with respect to
6 those topics?

7 MS. SCHARFSTEIN: Well, I think that I pretty much
8 said it in my letter. I could highlight those points, but I
9 think that -- I mean, we did one that limited to the emergency
10 services unit and I think they agreed to that.

11 I think that some of the topics as written are kind of
12 off because with regard to the supervision and chain of
13 command, I don't really think we have that. I mean, there's
14 certainly a patrol guide provision that addresses how EDPs
15 should be handled and some of that applies to ESU. I guess my
16 primary concern was that the topics are written so broadly that
17 they don't really address the specific situation we have here.
18 And I think I gave the example of how you handle an EDP on an
19 elevated surface or on the top of a bridge brings into a lot of
20 considerations that aren't present here. So it really should
21 be limited to the scope of the type of issue that was presented
22 here, the circumstances that were presented here.

23 THE COURT: Mr. Sells, you didn't really get a chance
24 to speak about the EDP 30(b)(6) notice. Do you want to address
25 that? Maybe I'll begin by asking you a question, which is I

1 understand that you are prepared to limit notice topics 1 and 3
2 to three years back from the date of the incident.

3 MR. SELLS: Correct.

4 THE COURT: I guess that would get us to July 1, 2012.

5 Why don't you tell me why you think you need to go ten
6 years back for notice topics two, four, and five.

7 MR. SELLS: Because I think, your Honor, what prompted
8 the NYPD to look at their EDP protocol was Eleanor Bumpurs
9 case. So that was well more than three years ago. And in that
10 case there was an EDP who ended up being killed by police.

11 THE COURT: When did that take place?

12 MR. SELLS: I don't remember the exact year.

13 MR. BRENNAN: Early 1980s, your Honor.

14 MR. SELLS: So that's where it started, but then there
15 was an evolution of the protocols, how to handle an isolated
16 and contained emotionally disturbed person. And the *Bah* memo,
17 which your Honor reviewed prior to it being disclosed, makes
18 reference to multiple times where ESU had an isolated and
19 contained EDP, decided to make a partial door breach and then
20 once the door was breached, it resulted in the ESU having to
21 use force to deal with the emotionally disturbed person.

22 And the conclusion was, if the door is never breached,
23 you don't have this problem, but the *Bah* memo itself talks
24 about prior instances where this occurred. So we want to know
25 what those prior instances were. And I'm not talking about

1 elevated surfaces. The *Bah* memo itself speaks to isolated and
2 contained EDPs that ESU disturbed by going into their space.

3 THE COURT: But your topics two, four, and five aren't
4 limited to isolated and contained.

5 MR. SELLS: We're willing to do that. We're willing
6 to do that, your Honor. We're willing to limit it to just
7 isolated and contained EDPs. And certainly when Chief Banks
8 wrote that memo, he made specific reference to multiple
9 occasions where isolated and contained EDPs were engaged by ESU
10 because ESU made a partial door breach.

11 THE COURT: Thank you.

12 With respect to --

13 MS. SCHARFSTEIN: Can I just respond to that?

14 THE COURT: Sure.

15 MS. SCHARFSTEIN: I just wanted to make clear, there's
16 no evidentiary basis here to say that this incident involved a
17 partial door breach. *Bah* spoke of partial door breeches. This
18 case involved no opening of a door, it was cutting of a hole
19 and that's what led to the emergency and that's what led to the
20 full entry, so it was not a partial door breach.

21 In addition to which, those other incidents, I thought
22 I pointed this out in my letter, but those other incidents are
23 a whole variety of circumstances, not necessarily related to
24 those here. So the *Morales* case was an EDP above -- on top of
25 an elevated surface. Some of those other cases involved full

1 door breaches. In the *Bumpurs* case, the officers went into the
2 apartment and there were revisions to the procedures then at
3 that point, but not necessarily related to those here.

4 So the point is that the procedures that were followed
5 here were the ones that were appropriate for this incident.
6 And our view is there's no need to go back further than three
7 years because those prior revisions are not necessarily related
8 to this, and three years should be enough of a window to
9 determine whether things have been happening over a period of
10 time such that the city should have been on notice that some
11 additional training was necessary.

12 I mean, I think I went through all of those incidents
13 in my first letter, which would have been March 5, and was it
14 March 5. Yeah, it was, some of those incidents were street
15 encounters that had nothing to do with partial door breaches,
16 which this case wasn't even, and five of the incidents were not
17 ESU involved at all.

18 THE COURT: Thank you.

19 MR. BRENNAN: Your Honor, one thing.

20 THE COURT: Yes, sir.

21 MR. BRENNAN: May I address the issue about the
22 depositions of the hospital police officers.

23 THE COURT: Of course.

24 MR. BRENNAN: They're employees of New York City
25 Health and Hospitals Corporation. We've produced the emergency

1 room physician, Dr. Silverberg. We spent eight or so, nine
2 hours with him. His deposition is not done. That will be
3 completed Friday this week. We have agreed to produce the
4 emergency room nurse.

5 We got this request for three different hospital
6 police officers, two officers and a sergeant. The first,
7 Officer Frazier, we were advised is out on sick leave. He had
8 a medical illness. We were told he would not be able to give a
9 deposition. If any further information is needed, I'll have to
10 get information from Officer Frazier and a HIPAA disclosure so
11 I can say what wrong with him, but at this time he's not
12 available.

13 The other two, Sergeant Goulart and Officer Robinson
14 are available. I agree they're fact witnesses, but just to put
15 their role in perspective, Mr. Paul came into the emergency
16 room on proper on 1 a.m. on July 2, 2015. At 1:20 his heart
17 stopped. He stopped breathing and his heart stopped and he
18 was -- an effort was made for 19 minutes to resuscitate him,
19 but he could not be resuscitated. He was pronounced dead at
20 1:39. The officers were called at about 1:05 a.m. to assist
21 the hospital staff because Mr. Paul was agitated and combative,
22 he was handcuffed as they were trying to transfer him from an
23 EMS gurney on to a hospital stretcher. They couldn't do that
24 because he was a big, strong person and he was agitated and was
25 fighting with them.

1 So the officers are relevant to that part of the case
2 because they had observations consistent with what everyone had
3 documented in the record. And to the extent that there may be
4 some police interview notes or records out there that are
5 inconsistent, the witnesses are going to say that the officer
6 who took that information down got it all wrong. They are
7 witnesses to events here. So I didn't oppose the request to
8 produce them, but I do request there be some limits as to the
9 time that's spent with these witnesses.

10 For many of the depositions so far, we've started the
11 deposition day at 10 a.m., we've taken an hour break largely at
12 Mr. Sells insistence that we take numerous breaks during them,
13 and some of them go well into the evening. For instance, the
14 medical examiner, Dr. Smiddy went from 10:30 a.m. to about
15 8 p.m. last week. These witnesses, the police officer
16 witnesses from the hospital, I can't imagine any need to
17 question them for seven hours. And in order to meet this
18 deadline of completing this fact discovery by the end of March,
19 I think it would be reasonable to impose some stricter time
20 limits for them so we can get all this accomplished.

21 THE COURT: Understood. Thank you.

22 Let me begin with the request to extend the number of
23 depositions to 24. At this point I'm denying that request.
24 It's without prejudice. If you come to me and can make a
25 detailed showing as to why an individual deposition will have

1 unique information that you were unable to get from any of the
2 20 depositions that you've taken, then I'll entertain the
3 request, but 20 depositions is a significant number, and leave
4 it to the parties. I think generally you have all gotten along
5 reasonably well, at least compared to some of my other cases.
6 Maybe if there is one additional deposition that's necessary,
7 maybe as a courtesy, it will be extended, but the periods of
8 time should work together and do their best to keep the
9 depositions to 20.

10 And Mr. Sells, you should work with your adversaries
11 to stage these in whatever way is appropriate. I'm not going
12 to direct you to take one deposition over another. I'll
13 obviously leave that to your good judgment, but to the extent
14 you can glean information about people who might have more
15 information than others, you should speak with your adversaries
16 and see whether or not certain depositions should be
17 front-loaded or certain individuals as between two should go
18 first.

19 With respect to the sort of general requests about
20 these depositions, you are all officers of the court. I expect
21 everybody to behave appropriately during depositions. Nothing
22 specific has been brought to my attention to make me think that
23 Mr. Sells or anybody from his office is conducting depositions
24 in a manner that is hazard harassing or improper. Obviously
25 those depositions should be as efficient as possible. You're

1 taking the time of law enforcement and medical officials away
2 from their jobs. So you should make these deposition as
3 efficient as possible, but I'm not going to limit the amount of
4 time beyond what the rules already limit, nor am I going to
5 limit the manner of questioning. I know, Ms. Scharfstein, you
6 made a reference to trying to box in witnesses, but depositions
7 generally serve two purposes: To gather information and to try
8 and lock witnesses down to certain testimony. So Mr. Sells and
9 his cocounsel are free to ask whatever appropriate questions
10 they seek to ask. I'm not going to limit the ways in which he
11 conducts those depositions.

12 In addition, with respect to the request that
13 non-party depositions take place in the city's offices, I'm
14 also going to reject that request. Again, nothing has been
15 told to me to make this case anything outside of the ordinary
16 way of course. So typically a deposition that's noticed by one
17 party takes place at the noticing party's officer. So I'm not
18 going to limit it in any way.

19 With respect to the 30(b)(6) witnesses, it sounds like
20 with respect to the EDP notice on the consent of the
21 plaintiffs, those notice topics one and three will be limited
22 to three years back and all of the notice topics will be
23 narrowed to limit just to isolated and contained EDPs. So
24 certain of these notice topics are not specific to that and
25 they should be amended to reflect that.

1 With respect to notice topics two, four, and five,
2 I'll authorize and direct that the witness be prepared to speak
3 to incidents that go five years back from the date of the Paul
4 incident, ten years back seems to me excessive, but I will
5 grant five years back.

6 With respect to the notice topics for the Taser
7 witness, it seems to me that a number of these topics are not
8 appropriate for this case. Specifically topics related to the
9 history and practices of the NYPD with respect to Tasers,
10 studies and surveys that are compiled, discipline of other
11 officers, substantiated allegations against officers. It seems
12 to me, as you've pointed out, Mr. Sells, that what you're
13 interested in was what the policy was at the time of this
14 incident, how Taser usage is recorded and whether or not it can
15 be manipulated in any way, whether or not the report that you
16 provided to me is accurate, questions about the prongs and the
17 missing fourth prong, those sorts of questions seem appropriate
18 to me.

19 The questions that relate to policy and practices of
20 Taser use generally going back historically, and questions
21 related to allegations of misconduct by other officers in
22 connection with Taser use I think is not appropriate. Your
23 Taser claim focuses just on excessive force, as I understand
24 it. And so going into what I consider *Monell* discovery for
25 that issue is not appropriate.

1 I think that leaves us just with this issue with
2 respect to the cell phone. Here's what I think is appropriate.
3 And based on my extensive work in authorizing these types of
4 quarter notice criminal docket, I have a fairly good idea of
5 what can be produced. So you can request a service provider to
6 provide you with just the phone numbers that are contacted,
7 people call these trap-and-trace orders. So just what phone
8 numbers were contacted during a particular period of time. And
9 as I understand it, we're talking about a few hours at the
10 relevant day. So an appropriate order can be issued to the
11 service provider requesting just the numbers that communicated.

12 And you can get information about numbers that
13 communicated as far as phone calls. I believe you can even
14 find out whether it was a phone call or a voice message that
15 was left, and whether or not there was a text or some sort of
16 instant messages going back and forth whether through
17 Blackberry or through iPhones without receiving any content.

18 So in the first instance, the appropriate subpoena
19 should be just for the phone numbers. As I understand it,
20 there's a question about whether or not one officer called a
21 supervisor. I believe that's the disputed issue and there's an
22 open question of whether or not that even happened. Let's
23 first find out whether or not there's contact between the
24 relevant phone and the receiving phone and then we can go from
25 there. And if we can see whether or not it's a text or

1 something, we can have further conversations about whether or
2 not the provider should be ordered to produce that information
3 as well.

4 I'll also note based on my experience, that if a
5 preservation request hasn't been made to the provider that
6 should accompany this request. So that if, ultimately, we can
7 see that the two relevant people were texting each other, we
8 want to get those texts, we want to make sure that's preserved
9 at least starting now. But in the first instance, just the
10 contact numbers should be produced and we can go from there.

11 Any questions on that?

12 MR. SELLS: No.

13 THE COURT: I think that addresses all of our
14 outstanding issues. I'll note that it's March 13. You have
15 two weeks, I think, to complete all of your depositions.

16 Is that going to happen?

17 MR. SELLS: No, your Honor. I can assure you that it
18 will not.

19 And so that was one of the things that we wanted to
20 raise as well, whether or not we can get an extension of the
21 fact discovery deadline as well as the notice period for
22 identifying our experts. So if we can push those back.

23 I would also ask, your Honor, I know you're limiting
24 us to 20, but can we get a Mulligan on the B list depositions.
25 We both agree that was a know-nothing witness as far as this

1 case goes.

2 THE COURT: The problem with Mulligans, as a mother
3 and spouse of a golf player is that once you give one, it seems
4 people want them repeatedly. Why don't you move forward with
5 the 20 and see what you can do. And I'm sure Ms. Scharfstein
6 will be reasonable if there's appropriate basis.

7 I will also say, and I'm not directing you to take
8 your depositions in fewer than seven hours, but to the extent
9 that you can agree to take two depositions in seven hours,
10 maybe you can horse trade a little bit.

11 MR. SELLS: I can tell you that Beelitz, that had to
12 be like two hours.

13 THE COURT: Let me also make one request, let's keep
14 these depositions in the window from 9 a.m. to 7 p.m., unless
15 the witness is requesting an accommodation because of the
16 witness's schedule, but otherwise 9:00 to 7:00 gives everybody
17 enough time to conduct a seven-hour deposition and take
18 whatever appropriate breaks are necessary. Let's keep these
19 breaks short. No one needs to have a full course lunch. I'm
20 sure everybody's eager to move this case forward and get back
21 to their other work as well. But let's make that a reasonable
22 bookend so we're not having late starting depositions that end
23 up going into 8:30, 9:00 at night.

24 Mr. Sells, what are you proposing to me as a
25 reasonable request to extend discovery?

1 MR. SELLS: Your Honor, to me I would ask that the
2 Court give us until maybe the middle of May.

3 THE COURT: The middle of May.

4 MR. SELLS: Yes.

5 THE COURT: From defense table, any objections to
6 that?

7 MS. SCHARFSTEIN: Your Honor, I understood that
8 plaintiff's counsel was going to be unavailable the first week
9 in April. I don't know that it can't be done by the middle of
10 May. And, in fact, in the interest of full disclosure, I have
11 been hunting for many months for some civilian witnesses I
12 would like to take as well and they have eluded me, so I would
13 like to continue with that process.

14 But I also want Mr. Sells to have some breathing room,
15 so, as I said, he can sequence the depositions in a way that
16 makes sense and that we're not locked into doing more than is
17 necessary because we are stuck with witnesses' availability or
18 counsel's availability. And I think so far what we've been
19 doing is trying to go forward on whatever date it is that all
20 of the necessary parties are available, and that's why Beelitz
21 went first. And I don't know if that's turned out to be the
22 most productive in retrospect.

23 THE COURT: Let's set the close of fact discovery as
24 May 24. That gives you all more than two months, which should
25 be adequate time. I'm not going to extend that again, so get

1 your work done within that period of time.

2 I will set the deadline for expert disclosures to be
3 June 14, any rebuttal reports to be served on July 12, and
4 let's complete all expert discovery and depositions on
5 August 2.

6 MS. SCHARFSTEIN: We were supposed to get notice
7 sooner of who the plaintiffs would be using their areas of
8 expertise and a brief description of the subject matter. That
9 date was supposed to be April 1. I don't know that it needs to
10 be, but the reason that the schedule was structured in that way
11 was because to get experts at the city, I need a window of time
12 to get pre-approval.

13 THE COURT: Can you disclose by May 15?

14 MR. SELLS: I think we can, your Honor.

15 THE COURT: Let's make May 15 a deadline for
16 disclosing experts and that report will then be due June 14.
17 So it's a month beforehand.

18 Before we adjourn, let me encourage the parties to
19 continue working together to try and resolve these disputes.
20 Obviously you can bring things to my attention as you see fit
21 after an appropriate meet and confer.

22 I'll just mention briefly the issue of settlement. I
23 don't know whether or not the parties have had any serious
24 settlement discussion. I will tell you that, one, I'm very
25 busy, so if you want to have a settlement conference with me,

1 my schedule books up pretty quickly. So if you ask me today
2 for a settlement conference, I'd probably give you a date in
3 May.

4 No. 2, in the summer everybody is busy and I'm not an
5 exception to that rule. So if you think you might want to have
6 a settlement conference with the Court, maybe after the close
7 of fact discovery and maybe even before expert discovery
8 happens, now would be a good time to get in my calendar for
9 some time in late May or early June. I actually think that
10 window is already pretty busy, but I would speak with my deputy
11 if you're interested. Or if you think you want to come in
12 after the end of expert discovery when the parties have really
13 fully fleshed out their case, but before you invest in summary
14 judgment motions, you have a little bit more time to make those
15 requests, but probably August will be a bad time for you to
16 come in based on my schedule and your own schedule.

17 So let me just keep that topic at the front of your
18 consideration, and if you do want to come in after the close of
19 fact discovery but before expert discovery, now is the time to
20 get on my calendar.

21 Thank you very much everybody.

22 (Adjourned)